
DATE: November 8, 1994

Case No.: 93-ERA-44

IN THE MATTER OF

DOUGLAS HARRISON,
Complainant,

v.

STONE & WEBSTER ENGINEERING GROUP,
Respondent.

Appearances: James H. Stansell, Jr., Esq.
For the Complainant

Robert M. Rader, Esq.,
For the Respondent

Joan B. Tucker Fife, Esq.,
For the Respondent

BEFORE: Richard K. Malamphy
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

Complainant Douglas Harrison brought this action alleging that Respondent, Stone & Webster Engineering Corp., discriminated against him in violation of the whistleblower provisions of Section 210 of the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851, and the implementing regulations of the Secretary of Labor at 29 C.F.R. Part 24. Specifically, Mr. Harrison alleges that he was demoted and transferred to a less responsible work area in retaliation for engaging in activity protected under the ERA. Harrison asserts that the fact that Stone & Webster demoted him on the same day that he reported what he

believed to be safety violations to the Nuclear Regulatory Commission site representative, indicates a retaliatory or discriminatory motive. In addition, Harrison complains that he was required to leave the restricted area of the reactor and move to an "outside crew" two days after he was demoted, and the men formerly under his supervision refused to work because their safety concerns had not been addressed by supervisors. Harrison argues that his demotion and transfer to an outside crew, so closely following his report of alleged safety violations, supports an inference that Stone & Webster took these employment actions against him in retaliation

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for his protected activity.

Respondent asserts that Harrison did not engage in any protected conduct, and was cut back from his lead foreman position for strictly legitimate, business-related reasons. Harrison rejected the foreman position offered to him at the time of the cutback, and insisted on taking a journeyman's position. The Respondent contends it was merely a fortuitous coincidence that Harrison's supervisors reviewed the roster for excessive lead foremen positions, and that Harrison first spoke to his supervisors about his safety concerns, on the same date. The Respondent argues that: [1] Harrison did not engage in any protected conduct because his supervisors were unaware that, prior to his cutback, he was attempting to raise a safety issue; and [2] the decision to cut back Harrison to a foreman was a legitimate, business-related determination.

The hearing in this matter was held on February 23-25, 1994, in Huntsville, Alabama. Both parties appeared at the hearing and submitted post-hearing briefs.

FINDINGS OF FACT

Respondent

I.Stone & Webster is a contractor for the Tennessee Valley Authority ("TVA"), licensed by the Nuclear Regulatory Commission ("NRC") to construct and operate the Browns Ferry Project. The Browns Ferry Project, located outside Huntsville, Alabama, is a three-unit nuclear plant that produces electric power. Stone & Webster performs construction and maintenance work for the project. (Tr. 388).[1]

II.Unit 3 of the Project has a Reactor Building with a drywell inside of it. (Tr. 388). The drywell is about 50 to 60 feet in total diameter. It has an outer concrete wall and an inner wall within the reactor vessel. The distance between the inner and outer walls is about 15 to 20 feet. (Tr. 391). There are several elevations in the drywell. The bottom elevation is elevation 563, which is ground level within the Reactor Building. (Tr. 392). Other elevations are elevations 584, 604, 616, and 628. (Tr. 486). Elevations in the drywell are connected by either a series of ladders, catwalks or platforms. (Tr. 392).

III.The work performed by ironworkers at the Unit 3 drywell in early 1993 was a seismic upgrade of platform steel. (Tr. 618).

IV.As of late January 1993, four ironworker production crews were assigned to various elevations in the drywell. (Tr. 549, 618). One crew was assigned to elevation 563 and three were assigned at elevation 584. (Tr. 618). Elevation 563 was known as "lower steel" and elevations 584 and above were known as "upper steel." (Tr. 619).

Complainant

V.Douglas Harrison, Complainant, was employed by Stone & Webster during 1992 and 1993, at the Browns Ferry Project in the Unit 3 drywell in several capacities: as journeyman ironworker, ironworker foreman, and as a general foreman (also known as lead foreman).

(Tr. 13).

VI.When Complainant was first hired sometime in June 1992, he worked as an ironworker journeyman. Complainant was first promoted to foreman after a six week hiring-in program, during which time he underwent training in safety programs, including radiological safety. (Tr. 14).

VII.At the time Complainant was hired, approximately 30 or 40 other ironworkers were hired also. Complainant recalled that there was a continuous hire in process over the next few months. (Tr. 15). All of the men hired in with Harrison were hired from the local union. Workers hired later belonged to other unions throughout the country. (Tr. 16).

VIII.Complainant recalled that when he was hired in with both TVA and Stone & Webster, they encouraged him to raise any safety concerns, if he had any during the job. (Tr. 102). He understood that if he had any safety concern he should raise it with Stone & Webster supervision, and that if he could not get a response he should go to the Nuclear Regulatory Commission ("NRC"). (Tr. 105). Complainant admitted that none of his supervisors ever said anything to discourage him from raising a safety concern with any managers or the NRC. (Tr. 106). His supervisors never spoke of the NRC in any derogatory way to Complainant. They never threatened Complainant with retaliation if he spoke to the NRC about a safety issue or raised a safety issue with management. (Tr. 108).

IX.Complainant was advanced to the position of second lead foreman in the Unit 3 drywell on October 6, 1992. The difference in pay from his position as foreman and his position as lead foreman was about two dollars per hour. (Tr. 16). No other benefits accompanied the promotion. (Tr. 17).

X.Wayne Tennyson, one of Complainant's supervisors, and Gene Hannah, another lead foreman, offered the lead foreman position to Complainant. They told Complainant that the position was available to him because he had worked in the plant before, he knew his way through the plant, and he knew the procedures. They needed a new general foreman because they had several new hires coming in who had never been in a nuclear plant before. (Tr. 17-18).

XI.The first time he was promoted to lead foreman, Complainant was given no assurances as to how long he would hold the position. (Tr. 116). Mr. Tennyson told Complainant that if there came an occasion to cut back the lead foremen, Complainant would be cut back first because of Gene Hannah's seniority as lead foreman. Complainant agreed to this arrangement. (Tr. 116).

XII.After Complainant was set up as general foreman in October 1992, he was cut back to foreman in late November because the plant had a reduction in force. As foreman, Complainant went back to pushing a crew. Terry Keeton, the foreman who had been set up in Complainant's place went back to a journeyman's position. (Tr. 117). Complainant made no complaints about being cut back. (Tr. 116).

XIII.Complainant knew at the time he was cut back in November 1992, that more than a couple of crews were laid off, with each crew consisting of approximately seven men. (Tr. 19).

XIV.In early January 1993, Complainant was set up as a lead foreman again, under the same conditions as his promotion in October 1992. (Tr. 20). Stone & Webster was trying to finish the "lower steel" on elevation 563 and was moving workers to elevation 584. (Tr. 120, 489). Complainant was designated lead foreman over the work on elevation 563, while Gene Hannah, the other lead foreman in the drywell, assumed responsibility for the new work on elevation 584. (Tr. 489-90).

XV.When Complainant was set up as second lead foreman again, in January 1993, he recalled that Wayne Tennyson and Joe Fonte, another supervisor, again advised him that, if there was a reduction, Complainant would be the first one cut back because of Hannah's seniority. (Tr. 120).

XVI.Complainant testified that he did not recall receiving any written instructions or job description setting forth his duties as lead foreman in the Unit 3 drywell. (Tr. 21). The information Complainant received regarding his authority and responsibilities as lead foreman came from his supervisory personnel, either John Sertway, Wayne Tennyson, or Joe Fonte. (Tr. 22).

XVII.One of Complainant's responsibilities, both as foreman and lead foreman, was to conduct safety meetings for his crew. (Tr. 22). The safety meetings occurred once a week, usually on Monday mornings. The meetings took place in the dress out area. While the meetings were going on, the crews were required to participate in the meeting, then they would dress out and go inside the drywell. The men were charged 30 minutes on their time sheets every Monday morning for safety meetings. (Tr. 23).

XVIII.In addition to Complainant, other foremen and supervisors attended the safety meetings, including Wayne Tennyson, Joe Fonte, John Sertway, Steve Ehele, and occasionally Gary Davis or Mr. Butts. (Tr. 24). If anyone had a safety issue to discuss, it would be presented

to the group for discussion. Complainant did not recall a time when the four supervisors were not present. (Tr. 25).

XIX.Complainant testified that he was presiding at a safety meeting on the morning of February 1, 1993. At that meeting, individual ironworkers raised safety concerns about the implementation of the fire protection program plan in the drywell. (Tr. 25). Complainant said that "the guys' big beef was fire watch." (Tr. 25).

Stone & Webster's Fire Protection Program

XX.TVA and Stone & Webster established a practice in late 1992 and early 1993, requiring ironworkers to attend fire watch school, conducted by TVA, to train them to perform their own fire watches while they were in the drywell. Prior to this new program, the laborers had always maintained the complete fire watch in the drywell. (Tr. 27).

XXI.To maintain the complete fire watch, the laborers were completely responsible for fires

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that may have broken out in the drywell. They signed off on all the fire watch papers. They kept the fire extinguisher and went to the fire watch school. (Tr. 28).

XXII.The concept of keeping the exposure to radiation as low as possible for each individual is referred to as ALARA ("as low as reasonably achievable"). Under the ALARA principle, it is better that fewer persons are exposed to radiation. (Tr. 514). The means of keeping radiation doses as low as possible is to control personnel access in a particular area of radiation. (Tr. 390). The drywell is higher in radioactive dose than any other part of Browns Ferry Unit 3. Therefore, because of the ALARA principle, radioactivity in the drywell affected management's decision about deploying workers there. (Tr. 609). Keeping doses within ALARA limits for work performed in the Unit 3 drywell was of concern to Stone & Webster. (Tr. 609).

XXIII.Under the new fire protection program plan, authored by TVA in October 1992, direct responsibility for the fire watch was placed upon the personnel in the vicinity actually doing the work. (Tr. 368). As soon as ironworkers were trained in fire watch responsibilities, they were instructed to perform their own fire watches. (Tr. 30). Attachment I of the Brown's

Ferry Nuclear Plant Fire Protection Program Plan (JX 1) is posted outside the drywell and is signed by those performing fire watch. (Tr. 29-30).

XXIV.Attachment I at 5.3.4., provides for a fire watch to be present throughout any operations in which there is a potential for fire and vulnerability of property and equipment ["hot work"]. The fire watch must remain in the immediate work area for 30-minutes after the completion of all "hot work." The fire watch may be responsible for more than one hot work activity if the work is coordinated properly and location of activities is within the scope of view of the fire watch. (JX-1).

XXV.The general practice, according to Complainant, has been to pair up the ironworkers to work together, one fitter and one welder. Supervision expected that the structural man would fire watch for the welder, then the welder would fire watch for the structural man while he was cleaning. (Tr. 54).

XXVI.Two laborers per elevation in the drywell also performed a roving fire watch any time hot work was performed on or above that elevation. (Tr. 402). The laborers were available to watch the welding machines and other ignition sources in the drywell. (Tr. 397). Laborers who performed "continuous area fire watch" (also known as "roving fire watch") would sign on to the hot work permit of Attachment I of the Fire Protection Program Plan. (Tr. 377-78, 407; JX 1). Under the new fire watch procedures, the roving fire watch was considered secondary to the primary fire watch performed by the ironworkers. (Tr. 378, 397).

XXVII.By using ironworkers for the primary fire watch, and limiting the laborers to fire watch of the welding machines, and other ignition sources in the drywell, and performance of the secondary fire watch, Stone & Webster was able to avoid the need to put extra bodies in the drywell for fire watch purposes. (Tr. 398). This reduced overall occupational exposure to radiation.

XXVIII.Complainant made an entry in his journal on January 11, 1993, explaining:

There will be two roving fire watches per elevation [in the

drywell]. Ironworkers will fire watch for [themselves] at detailed
locations. The roving fire watch will be on hand for the one-half
hours cool-down at the end of the dive.

(Tr. 204-05; CX-6). This log entry contains no reference to any disagreement over fire watch responsibilities or discussions with Stone & Webster supervisors.

XXIX.Ironworkers did not work continuous 10-hour shifts in the drywell. (Tr. 33). They would come out of the drywell, often after performing hot work, for the morning break, lunch, afternoon break, and quitting time. (Tr. 34). Upon exiting the contamination zone, each worker who had received fire watch training remained signed on to Attachment I of the Fire Protection Plan, indicating that he was responsible for fire watch during the 30-minute cool-down period at the site where he had been working. (Tr. 34).

XXX.Stone & Webster supervision understood that laborers were available to perform continuous fire watch if ironworkers needed to leave the drywell for breaks, lunch, or at the end of the day, provided the laborers had signed on to the "hot work" permit. (Tr. 404).

XXXI.Complainant testified at the hearing that the roving fire watch was not sufficient because in some areas on the elevation you can see approximately 15 feet, while in other places you cannot see more than three or four feet on either side because of duct pipe or other obstructions. (Tr. 53).

XXXII.At the hearing, Complainant's supervisors, however, described the drywell as "not much bigger than this room [25 feet X 11 feet]. (Tr. 380). Mr. Butts said that the roving fire watch could maneuver himself to a position from which he could see everything within an arc of 180.(Tr. 380). Mr. Ehele added that it took about two minutes to go around the circumference of elevation 563. (Tr. 658). Mr. Ehele was able to do so without climbing up and down any ladders to get over or around things. (Tr.659).

Complainant's Involvement in the Fire Watch Issue

XXXIII.The concern about fire watches that was expressed at the February 1, 1993 meeting, was that the fire watch was not being handled according to procedure during the mandatory 30-minute cool-down period. (Tr. 26).

XXXIV.Complainant testified that crews were working in several different places on one elevation, so that two rovers could not physically see within their scope of view every area being worked on that elevation. (Tr. 34). Complainant's foremen were complaining that two rovers were not enough to watch a 360 degree circle. (Tr. 148).

XXXV.The ironworkers were concerned that the rovers were not capable of covering the work areas during the 30-minute cool-down period. (Tr. 33). The ironworkers did not want to sign off on Attachment I certifying that they were responsible for fire watch in their work area because they had heard rumors that no one would be fire watching during the cool-down.

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(Tr. 138).

XXXVI.The ironworkers told Complainant that they did not like having to sign the fire watch paper and do the fire watch because they would be on their way home and still be on that fire watch paper for that 30-minute -cool-down period. (Tr. 142).

XXXVII.Complainant asserted that to "get rid of the headache, give it [the fire watch] every bit back to the laborers. Then there wouldn't be a 30-minute cool-down for the ironworkers to worry about." (Tr. 141). The ironworkers did not want the responsibility the way the fire watch procedure was being implemented. At his deposition, Complainant stated "From the time that started, ironworkers and any other crafts . . . that were asked to take [the fire watch] felt like it was . . . just putting more responsibility to them to an already very responsible job and, . . . they were reluctant to take it. They really didn't want to take it but, . . . it was either take it or hit the road, so they went ahead and took it." (Tr. 145).

XXXVIII.Complainant said that he never argued that the laborers should do the fire watch rather than the ironworkers. (Tr. 139). He has never had a problem with an ironworker doing his own fire watch. The problem was the question of who would perform the fire watch during the 30-minute cool-down. (Tr. 139).

XXXIX.Attachment I required that "the fire watch may be responsible for more than one hot work activity if it is within his scope of view." (JX-1, Tr. 161). Complainant believed that two laborers on the roving fire watch alone could not keep all the places being worked on one

elevation within their scope of view. (Tr. 161).

XL.Complainant said that he did not realize until the February 1, 1993 safety meeting that this issue had escalated as far as it had, or he would have done something about it. (Tr. 37). Complainant's two foremen, Terry Keeton and Billy Davis, came to him immediately following the safety meeting and said they needed some relief from the fire watch issue because they were working out of compliance with the regulations. Complainant responded, "give me today and I'll get to work on it and see where the problem lies with it." (Tr. 37).

XLI.Before the February 1, 1993 safety meeting, Complainant testified that he, personally, never spoke with any supervisor about any fire watch concerns. (Tr. 156). Complainant said that he only became actively involved in trying to get the matter of the fire watch resolved after listening to ironworkers complain at safety meetings for six weeks. (Tr. 156).

XLII.After the meeting on February 1, 1993, Complainant sought out information from fire watch training and the fire marshal, both TVA officials. (Tr. 38). After hearing Complainant's concerns, Gary Wallace, the TVA fire protection official, told Complainant to have Mr. Ehele call or come by. (Tr. 162). Complainant had not mentioned that he intended to speak to Mr. Ehele. After talking with Gary Wallace in fire protection, Complainant consulted the lead foreman for the laborers, David Sparks.

XLIII.Mr. Sparks accompanied Complainant to a meeting with Steve Ehele, Complainant's supervisor. (Tr. 39). In that meeting, Complainant told Mr. Ehele that he had been to fire protection and to training, trying to work out the problem so that his men could be in compliance with the procedures. (Tr. 39).

XLIV.Mr. Ehele expressed to David Sparks his concern about the number of men spending time in the contamination area. (Tr. 39). Complainant recalls Mr. Ehele saying, "What am I going to have to do in there? . . . you're eating me alive on man hours in that drywell now on fire watches." (Tr. 39).

XLV.At the end of the meeting, Complainant told Mr. Ehele that he had been to TVA Fire

Protection and that Mr. Wallace wanted Ehele to call him or stop by to see him. (Tr. 40).
Complainant did not recall Mr. Ehele making any vocal response to him regarding this request. (Tr. 41). Because Ehele and Sparks discussed the idea of putting more laborers into the drywell, Complainant left the meeting with the impression that the next day there would be two more people per elevation to perform roving fire watch. (Tr. 179). Complainant went back to his work area and told his two foremen that he thought he had their problem solved. (Tr. 41).

XLVI.When Complainant came in to work the next day, February 2, 1993, he checked to see whether the fire watch was being performed according to procedure during the 30-minute cool-down period. The Attachment I sign-off sheet outside of the drywell revealed that there had been no change in the number of roving fire watches, and that the ironworkers were still signing off on the sheet during the 30-minute cool-down, when they were not in the drywell performing the fire watch. (Tr. 42).

XLVII.As a result, Complainant went back to TVA Fire Protection to talk to Mr. Wallace.
Mr. Wallace said that he had not seen or heard from Mr. Ehele. Complainant testified that he was angry at this news, because he thought that Mr. Ehele was not helping him get to the bottom of a serious problem. (Tr. 43).

XLVIII.Complainant decided that he would put his men in compliance with TVA procedures by any means possible, so he walked across the street by himself to the Nuclear Regulatory Commission ("NRC") office. (Tr. 43). Complainant did not tell Mr. Wallace that he was going to the NRC. (Tr. 162).

XLIX.Complainant spoke with Joe Mundy, the NRC site representative, and gave him a complete report of the situation. (Tr. 43). Complainant told Mr. Mundy that the fire watch was not being properly adhered to during the cool-down because there were not enough people to watch all the hot places that were in operation. (Tr. 163). To confirm Complainant's description of noncompliance, Complainant showed Mr. Mundy the Attachment I sign-off sheet which allegedly revealed the number of azimuths, or elevations, being worked and the number of fire watches for each elevation. (Tr. 44).

L.Complainant knew that it was the policy of the NRC representatives to keep confidential any safety concerns that employees brought to them. (Tr. 165). Complainant does not believe that the NRC inspectors ever revealed his identity to Stone & Webster. (Tr. 165).

LI.Complainant testified that no one from the NRC ever got back to him personally regarding his fire watch concerns. He received a letter in February 1994, explaining that the NRC had toured the drywell on March 30, 1993, and that everything was as it should have been. Complainant never received any communication from the NRC that the NRC determined there

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was a violation of any Stone & Webster or TVA fire watch procedures. (Tr. 168).

LII.Later in the day of February 2, 1993, Complainant checked back at the contamination zone to see if there had been any changes regarding the fire watch. (Tr. 55-56). He learned that there were still two roving fire watches, no more than there had been the day before. At approximately 2:00 p.m., Complainant called Wayne Tennyson from the phone outside the drywell. Tennyson instructed Complainant to come to Tennyson's office right away. When Complainant arrived, Tennyson told Complainant that he was being demoted to a to a foreman's position. (Tr. 56).

Complainant's Reduction From Lead Foreman

LIII.Tennyson told Complainant that management also planned to reduce two employees from foremen positions. Complainant did not recall that Tennyson gave him any explanation for the cut back. (Tr. 57).

LIV.At the end of the day Joe Fonte and Wayne Tennyson told Complainant that they would try to get supervision to reconsider the decision. Fonte and Tennyson went to a supervision meeting, at which Steve Ehele and Jimmy Butts were present. When Fonte and Tennyson came out of the meeting, they told Complainant that they had saved the jobs of two foremen, but they could not help Complainant. (Tr. 58).

LV.Tennyson told Complainant several times that he could take a foreman position. (Tr. 123). When Complainant came to work the next morning, on February 3, 1994, he refused the

foreman position. He said that he did not want to take a job away from one of his foremen for some action he had taken. (Tr. 123). Complainant told Mr. Fonte that "he would rather not take a foreman's job and . . . bump one of the [foremen] that's been working under him as a foreman and said that he would rather go back in the crew." (Tr. 596).

LVI.Complainant asserted his personal belief that Stone & Webster took action took against him because he went to the NRC and had conversations with them regarding the fire watch procedures. (Tr. 169). Complainant admitted that he had not heard anyone say that the reason for the cut back was that he had gone to the NRC or to fire protection and fire training and made waves over the issue of the fire watch. (Tr. 59).

LVII.On February 3, 1993, the morning that Complainant came to work after being cut back, he received permission from Gene Hannah, the lead foreman, to speak to the journeymen who had previously worked under Complainant's supervision. (Tr. 90). Complainant told the men that he had been cut back the previous afternoon, and that the fire watch problem was the same as it had been the day before. (Tr. 91). Complainant wanted the men to know that the two foremen who had previously worked under him, had offered Complainant to let him take their gang, but Complainant had refused. (Tr. 90). He explained to the men that he was not going to take a foreman's position because he did not want to punish one of his foremen for something Complainant himself was doing. (Tr. 90).

LVIII.As Complainant was leaving the meeting he heard someone say that the men should not

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go back to work until the fire watch problem was straightened out. (Tr. 91). After Complainant left, the ironworkers refused to enter the drywell. (Tr. 189). Mr. Ehele came down into the area to speak with the ironworkers personally to get them back to work. (Tr. 189).

LIX.Also on February 3, 1993, Complainant went back to see Mr. Mundy at the NRC, accompanied by Larry Morrow, the union representative, and Louis Moore, the AFL-CIO representative for all employees. Complainant informed Mr. Mundy of the demotion. (Tr. 91). As well, that day Complainant consulted with Mr. Salowitz in Stone & Webster's

Employee Concerns office. (Tr. 96).

LX.Although Tennyson asked him to reconsider taking a foreman position several times,
Complainant refused. Complainant chose, instead, to take a job as a journeyman ironworker.
Complainant performed some work for Terry Keeton, a foreman managing a crew in the Unit
3 drywell, previously under Complainant's supervision. (Tr. 124). Complainant said that he
did not recall exactly when he was assigned to Terry Keeton, and testified that one would have
to ask his supervisors "where they put me" because "I don't really remember." (Tr. 128).

LXI.Late in the day, on February 3, 1993, Complainant was straightening out a storage area,
and was not inside the drywell. (Tr. 60). Because Complainant was not inside the drywell, he
overheard a meeting of the supervisors, including Mr. Ehele, with the AFL-CIO representative
and the labor steward, David Sparks. (Tr. 60). The meeting was about the fire watch issue,
the 30-minute cool-down period, and everything related to it. (Tr. 61). Complainant testified
that at the end of the meeting the laborers got the complete fire watch back. (Tr. 63). The
ironworkers no longer fire watched. (Tr. 63).

LXII.When Complainant came to work the following day, February 4, 1993, as a journeyman
ironworker in Terry Keeton's crew, he was in the east access building with Terry Keeton when
he ran into Brownie Harrison, a TVA construction supervisor, and longtime acquaintance of
Complainant's. Complainant explained the story of his complaints to NRC, his subsequent
demotion, and all the other details. (Tr. 65). When Complainant finished talking Brownie
Harrison sat quietly for a few seconds, then got up and left the building without responding
to Complainant. (Tr. 66).

LXIII.Forty-five minutes after his conversation with Brownie Harrison, Complainant's job
steward, Larry Morrow, came to escort him out of the area at Mr. Ehele's instruction. Larry
Morrow told Complainant he had heard that Complainant was a troublemaker, and that he
was like Moses in the Red Sea to the ironworkers in the drywell. (Tr. 66).

LXIV.Ehele testified that after his meeting with the Unit 3 supervisors on February 2, 1993,
to determine which foremen would be reduced, he was approached by Complainant and Larry

Morrow in the hallway. Mr. Morrow requested, on behalf of Complainant, that Complainant be assigned to a work area other than the drywell where he had previously been lead foreman. (Tr. 626-27). Mr. Ehele agreed to the transfer request. (Tr. 627). Mr. Ehele testified that it is not unusual for an employee who has been reduced from a lead foreman or foreman position to request a transfer. (Tr. 628). These individuals do not necessarily want to work in the same crew where they previously made potentially unpopular decisions. (Tr. 628).

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LXV.When Mr. Ehele saw that Complainant was still in the area of the Unit 3 drywell on February 3, 1993, he asked Mr. Morrow to get Complainant and return him to his normal work area, outside the drywell. (Tr. 640). After the ironworkers refused to reenter the drywell because of their discussion with Complainant, Mr. Ehele felt that Complainant was holding meetings with some drywell workers and that Complainant could undermine Mr. Hannah's authority as lead foreman. (Tr. 640). Mr. Ehele admitted that he felt Complainant had a following, and Complainant's meeting with the ironworkers did not let them go about their business. He believed that Complainant was "acting as Moses when he parts the Red Sea." (Tr. 640).

LXVI.At Ehele's request, Morrow escorted Complainant outside to a new supervisor and general foreman on February 4, 1993. (Tr. 66). Complainant worked in the outside crew performing odd jobs and doing some welding until he was laid off after his surgery in April 1993. (Tr. 67, 71).

LXVII. Complainant knew of no other ironworkers that were cut back or laid off between February 1 and February 4, 1993. (Tr. 67). While Complainant was lead foreman supervising work in drywell level 563, until February 4, 1993, the number of ironworkers remained constant. (Tr. 70).

LXVIII.Job rosters recording the number of workers employed, revealed that between February 1 and April 12, 1993, the number of workers, foremen, and supervisors in the Unit 3 drywell stayed the same. The only thing that changed was the number of lead foremen.

(Tr. 89). Complainant testified that after he was reduced from lead foreman on February 2, 1993, no other lead foreman was set up for the crews that Complainant had previously supervised. Mr. Hannah continued to supervise those crews by himself. Complainant was not replaced in any way. (Tr. 207).

Stone & Webster Supervisors

LXIX.James L. Butts is the Field Manager for Stone & Webster at Browns Ferry. He held that position during the events in question. (Tr. 332). Butts has been the Field Manager at Browns Ferry since his arrival in April 1992. (Tr. 387). He has been employed by Stone & Webster for 25 years. (Tr. 388).

LXX.Butts is responsible for all field activities, including 50 supervisors and about 350 craftsmen. Butts is ultimately responsible for all Stone & Webster crafts at Browns Ferry. (Tr. 333-34).

LXXI.Under Butts' supervision were Steven Ehele, John Sertway, Joe Fonte, and Wayne Tennyson. (Tr. 333). In the chain of command, Ehele reported to Butts; Sertway, Fonte and Tennyson reported to Ehele; and the craftsmen, foremen, and lead foremen reported to their supervisors. (Tr. 333).

LXXII.Steven Ehele is the Chief Construction Supervisor for Stone & Webster at Browns Ferry. He was brought in sometime after January 6, 1993, to manage the Unit 3 ironworkers. (Tr. 619-20). He was responsible for assuring that all crafts working in the drywell performed their work in a timely, effective and efficient manner. (Tr. 616-17).

LXXIII.Ehele has been employed by Stone & Webster for fifteen years. He was first assigned to the Browns Ferry Project in August 1991 as manager for maintenance. (Tr. 617). Ehele has broad experience in construction activities in nuclear power plants, including several nuclear power stations throughout the United States where he has worked as both craftsman and supervisor. (Tr. 617-18).

LXXIV.Tennyson is employed by Stone & Webster as a Senior Construction Supervisor at Browns Ferry. He was first appointed to that position in May 1992. (Tr. 476). Tennyson has

over twenty years of experience in the nuclear industry, as both supervisor and craftsman. (Tr. 477).

LXXV.In late June or early July 1992, Tennyson was reassigned to supervise ironworkers in the Unit 3 drywell. (Tr. 477-78).

LXXVI.Sertway has been employed as Chief Construction Supervisor at Browns Ferry since 1992. (Tr. 536-37). When he first came to Browns Ferry in 1991, he was the Assistant Manager for civil structural craft at the site. (Tr. 537). Sertway has been employed by Stone & Webster for 24 years. (Tr. 536). Sertway has been a construction supervisor at several other nuclear power plants throughout the country. (Tr. 537).

LXXVII.When Sertway first came to Browns Ferry in 1991, he was in charge of all civil crafts at Browns Ferry Unit 3, including laborers, ironworkers, carpenters and cement masons. (Tr. 539). Later, Sertway assumed responsibility for ironworkers at elevation 584 in the Unit 3 drywell. (Tr. 539-40). Besides the ironworker crew he supervised in January 1993, Sertway supervised sheet metal workers in the drywell. (Tr. 541).

LXXVIII.During the latter part of 1992 and early 1993, Fonte was employed by Stone & Webster as a Structural Supervisor at Browns Ferry. He was supervising ironworkers at various elevations in the Unit 3 drywell. (Tr. 584). Fonte has been employed by Stone & Webster since 1979. (Tr. 584).

Stone & Webster's Claim that the Roster Review was the Basis for Cutbacks

LXXIX.Butts testified that sometime in January 1993, work began to wind down on the lower elevation of the drywell. Stone & Webster was concentrating more heavily on the upper elevations where work was already in progress. (Tr. 417).

LXXX.As Stone & Webster began moving its work to the upper elevations of the drywell, Butts reviewed the craft roster for "prudency protection." (Tr. 419). "Prudency protection" refers to TVA's practice of reviewing the ratio of foremen to craft to see whether Stone & Webster could justify how and why it was spending TVA's money. (Tr. 419). The sole consideration in Butt's review of the roster was the ratio of workers to foremen. (Tr. 351).

LXXXI.Butts reviewed the roster on January 27, 1993, and was particularly concerned about the ironworker area. He saw 38 ironworkers, and nine of these were designated foremen (including two lead foremen). (Tr. 421). Butts was concerned because he realized that the ratio was three ironworkers per foreman. (Tr. 421). The exact ratio between crews and

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foremen depends on the job site, the work being performed, complexity of the work and other considerations. For a skilled craft, such as ironworkers, Stone & Webster tries to hold the ratio to about eight ironworkers per foreman. (Tr. 421-422).

LXXXII.To the best of Mr. Butts' recollection, he spoke with Ehele at the end of January 1993, to request that Ehele consider whether there should be any foreman or lead foreman cutbacks based on the disproportionate numbers of ironworkers per foremen represented on the job roster. (Tr. 473). The exact date that Butts spoke with Ehele about this matter is ambiguous. Butts told Steve Salowitz, the Employee Concerns Officer for Stone & Webster, on February 5, 1993, that he had spoken with Ehele on January 29 to consider foreman cutbacks, yet Butts testified at the hearing that he spoke with Ehele on January 27, 1993. (Tr. 471, 473). Regardless of the exact date, however, Butts set in motion the roster review that eventually resulted in Complainant's proposed cutback by January 29, 1993, before Complainant's safety meeting on February 1, 1993.

LXXXIII.In addition to Ehele, Butts asked the supervisors of other crafts, including the pipefitters, boilermakers, sheet metal workers, and other mechanical crafts, to look at their rosters for possible cut backs on the same day he made the request to Ehele. (Tr. 427-28).

LXXXIV.Butts explained that his roster review and consideration of cutbacks was never based on the completion of any particular work package or the number of work plans in progress. He described work as "an evolving process." (Tr. 446). Butts merely noted the imbalance between the number of foremen and crews and requested that the supervisors review the situation. (Tr. 452-53).

LXXXV.Butts instructed Ehele and other supervisors to review the areas where supervision might be top heavy and report to him to "resolve that issue." (Tr. 420). Butts asked Ehele to

contact his supervisors, Tennyson, Fonte and Sertway, to review the numbers and look for possible cut backs, though Butts did not suggest the elimination of any individuals in particular. (Tr. 427, 621).

LXXXVI.When Ehele reported to Butts, either that afternoon or the following morning, he told Butts that a determination had been made that the crews were indeed top heavy with supervision. (Tr. 423). Ehele recommended that they cut back Complainant to a foreman position, and cut back Tommy Willis and Troy Faulks, two other ironworkers receiving foremen's pay, to journeyman ironworker positions. (Tr. 424).

LXXXVII.At the time Ehele spoke with them, Sertway, Tennyson and Fonte expected to finish work at elevation 563, where Complainant supervised the only construction crew, and to move the crew to elevation 584 under Gene Hannah's supervision. (Tr. 495-96, 549). As a result, Fonte, Sertway and Tennyson decided that they could get by without Complainant as a second lead foreman. (Tr. 495).

LXXXVIII.The supervisors agreed that the crews were "top heavy with one lead foreman." (Tr. 586). As Sertway observed, at the time of Complainant's cutback, there were only four ironworker crews in the drywell. Sertway thought it was difficult to justify two lead foremen supervising four total crews. (Tr. 549).

LXXXIX.Sertway testified that the only consideration in his decision to recommend to Ehele Complainant for a cut back rather than Hannah, was the fact that Hannah had been set up first. (Tr. 551-52). No comment by any ironworker regarding fire watch responsibility was in any way a factor in the supervisors' decision to recommend to Ehele that Complainant be cut back. (Tr. 556).

XC.The supervisors believed that one lead foreman in the drywell would be sufficient because there were more work plans on the upper elevations and only a few on elevation 563 remained. (Tr. 587). At the time he was cut back, Complainant only had one crew working for him. Furthermore, ironworker work was being consolidated into the upper elevations. (Tr. 563, 587).

XCI.When the supervisors recommended to Ehele that Complainant be cut back, Ehele was also concerned about the justification for paying foremen's wages to Willis and Faulks. (Tr. 590). Willis and Faulks were not supervising crews, but were performing functions allowing Stone & Webster to close out work packages. (Tr. 508, 544). Faulks and Willis did not report to a lead foreman; they performed essential paperwork and reported directly to a supervisor. (Tr. 648).

XCII.The supervisors adamantly felt that Willis and Faulks served necessary functions as foremen. (Tr. 544). Ehele disagreed with the supervisors' assessment of Willis and Faulks. (Tr. 624-25). As a result, the supervisors held a meeting on February 2, 1993, to resolve the disagreement over these two foremen. (Tr. 546). Ultimately, Tennyson, with Butts arbitrating, succeeded in persuading Ehele that Willis and Faulks were performing duties above the responsibilities of a normal journeyman ironworker. (Tr. 626). The supervisors persuaded Butts and Ehele that there was a justification for Willis and Faulks to continue to receiving foremen's wages. (Tr. 438-39, 544-45, 591).

XCIII.Mr. Ehele testified that any concerns expressed by Complainant over the fire watch duties absolutely did not factor in his decision to reduce Complainant from lead foreman to foreman. (Tr. 629).

XCIV.At the February 2, 1993 meeting no discussion was held regarding Complainant's cutback, because all agreed on the necessity of it. (Tr. 626).

Stone & Webster Supervisors Perceived the Fire Watch Issue as a Jurisdictional Dispute Between the Ironworkers and the Laborers

XCV.When the ironworkers began to assume responsibility for their own fire watch in the fall of 1992, the ironworkers were not receptive to the practice. They told Mr. Tennyson that they would prefer not to do the fire watches. Tennyson told them that he could not understand why the ironworkers did not want to police the work of their own trade, and why they would want to give their job to someone else. (Tr. 502). Tennyson had difficulty grasping the ironworkers'

objection to performing their own fire watches. (Tr. 501).

XCVI.Complainant admitted that Mr. Tennyson had probably told him that it was foolish for the ironworkers to give up part of their work because they would be losing overtime. (Tr. 141).

XCVII.Tennyson could not recall specifically when Complainant and Gene Hannah together raised a concern about the fire watches, but he understood it to be more of a jurisdictional problem about which trade would perform the work than any other problem. (Tr. 529).

XCVIII.Complainant acknowledged that in his discussions with his supervisors about the fire watch, the only thing he could recall Tennyson telling him was that "you should do [the fire watches]. It's your work." (Tr. 212).

XCIX.Sertway never heard any ironworker complain about any unsafe practice associated with the fire watch or anything that might have affected safety. (Tr. 555). Throughout the period when new fire watch procedures were being implemented, it was Sertway's understanding that the ironworkers did not want to perform their own fire watch because, "they wanted the laborers to do the fire watch." (Tr. 555).

C.Fonte recalled occasions when the ironworkers said they had a problem with doing their own fire watch, which Fonte interpreted as more a jurisdictional appeal. (Tr. 597). Fonte could not recall any reason stated for the ironworkers' preference; he merely heard that "they didn't want to do their own fire watch." (Tr. 598). Fonte interpreted this to mean that they felt like they were taking another person's job. (Tr. 598).

CI.Fonte understood all of the ironworkers' concerns as jurisdictional disputes: the ironworkers did not want to do their own primary fire watch. (Tr. 600-01). Fonte really did not know whether Complainant was attempting to raise some different issue. (Tr. 601).

CII.After Ehele assumed responsibility over the ironworkers in the Unit 3 drywell in early January 1993, he learned at a safety meeting that the ironworkers did not want to perform their own fire watches. (Tr. 629-30). At the safety meeting on February 1, 1993, Ehele perceived that the ironworkers were not happy performing their own fire watch; however,

nothing said at that meeting shed light on the reason for that preference. (Tr. 630).

CIII.Larry Morrow testified that Mr. Ehele told him, "I can't understand why y'all don't want to do your own work. You know, that's y'all's work in there." (Tr. 301). Morrow said that, nevertheless, the ironworkers did not want to do it. "That was just not our space -- to us it wasn't our work. It had never been until time when it had been changed over." (Tr. 301-02).

CIV.After Stone & Webster began implementing the new fire protection program in October 1992, Mr. Butts heard complaints through his supervisors that the ironworkers did not want to do the fire watch. (Tr. 406). Butts was told that the ironworkers did not feel that fire watching was their job. They simply did not want to do it. (Tr. 406).

CV.At the initial meetings regarding the fire watch issue, Mr. Butts had the impression that there was a labor problem. (Tr. 366). Butts had already held many meetings with the laborers

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on the fire watch issue, and the laborers' concern was that the ironworkers were taking work from them. (Tr. 366). Therefore, until the resolution of the fire watch issue in February 1993, Butts' impression was that there was a need to resolve a controversy between the laborers and the ironworkers. (Tr. 366).

CVI.Butts explained that the laborers' business agent accused Butts and Stone & Webster's labor relations personnel of taking the laborers' work. (Tr. 408). Butts tried to explain that Stone & Webster had wanted the ironworkers to perform their own fire watch because placing that responsibility upon the person actually performing the hot work improves safety. (Tr. 408-09). Despite Butts' explanation that Stone & Webster had not meant to violate any jurisdictional etiquette, the laborers' business agent took exception to Butts' statement. (Tr. 409). This issue came up periodically as a topic of discussion at council meetings between Stone & Webster management and the laborers' representatives. (Tr. 409).

CVII.The first time Butts understood that the ironworkers' objection to performing fire watches was anything other than a jurisdictional issue, in that they simply did not want to do it, was in early February 1993, the day the ironworkers refused to go into the drywell. Butts then

learned that this "isn't necessarily a labor issue, that the laborers are refusing to sign on to the fire watch permit." (Tr. 407).

CVIII.Butts explained that no one from TVA ever contacted him regarding any fire watch issue supposedly raised by ironworkers. (Tr. 414). None of the TVA officials ever advised Stone & Webster that it had not complied with the Fire Protection Plan or fire watch procedures regarding the number of laborers or failure to sign-on to hot work permits. (Tr. 414).

CIX.As well, Butts testified that no one from the NRC ever contacted him or any of his supervisors concerning any potential violation of fire watch procedures. (Tr. 415). Butts said that he learned that Complainant had gone to the NRC site inspector about fire watch concerns only a few weeks before the hearing in this case. (Tr. 426).

CX.The ironworkers made statements indicating that their objection to the fire protection program of October 1992, was essentially jurisdictional. Gene Franks, a welder in the Unit 3 drywell in late 1992 and early 1993, explained that he had to retake his fire watch school training because he deliberately failed it. (Tr. 266). Franks knew that he could be terminated for intentionally failing the fire watch test. (Tr. 283). He failed the test because he felt that it was not his job as an ironworker to do a laborer's job of fire watch. (Tr. 283). Franks was concerned about taking away work from the laborers, and as an ironworker he felt he was not at Browns Ferry to perform the work of a laborer, including fire watches. (Tr. 283).

CXI. Though Larry Morrow did not attend classes for fire watch training, and had no personal knowledge of any problem with the fire watch procedures, he knew that the problem expressed at the safety meetings was essentially a labor dispute between the ironworkers and the laborers about who should have fire watch responsibility. (Tr. 292-94). Morrow stated:

> [the fire watch] had always been laborers' work, and now it was being turned over to the craft assigned to that area, and the

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> ironworkers didn't want that. The laborers didn't want them to have it because they had always done it in the past at Brown's Ferry.

So it just every day, every week rather, it just got to kind of building up and building up until it came to a head.

(Tr. 294).

. . . [T]hey had sent some ironworkers up [to fire watch school], and they failed the test because they said they didn't want to do another trade's work. And they come and told me, two of them in particularly, that they failed the test and they wasn't going to do it. They didn't want to do their [i.e., the laborers'] job. That was their work.

(Tr. 295).

CXII.Morrow confirmed that the laborers were willing to work overtime for fire watches, but the ironworkers did not want the overtime. (Tr. 320). Morrow also confirmed that, at least for some ironworkers who carpooled together, having to work overtime for fire watches would be a problem. (Tr. 321).

CXIII.According to Morrow, at the safety meeting on February 1, 1993, the ironworkers were complaining that they did not want to perform fire watches, that they did not think that it was right that they should have to perform fire watches, and that they just did not want to do it. (Tr. 300).

CXIV.Complainant admitted stating in his deposition:

> "I told them [supervisors Tennyson and Fonte] numerous times the way to get rid of all this headache is to give all this fire watch back to the laborers . . . that would have been the way to get rid of the whole problem, give it every bit back to the laborers." (Tr. 140).

Stone & Webster Management Ultimately Resolved The Ironworkers' Fire Watch Concerns

CXV.After Ehele negotiated with the ironworkers on February 3, 1993, and encouraged them to reenter the drywell, Ehele met with Mr. Sparks, the lead foreman over the laborers for fire watches. In this meeting, Ehele learned that the ironworkers' concern was that the laborers allegedly were not signing on to the hot work permits. (Tr. 633). Ehele told Sparks that, if the only problem was laborers not signing on to the hot work permits, "that's very easily

resolved. Why can't the laborers go ahead and sign on to the hot work permits?" (Tr. 633).
Sparks said that would not be a problem, and that "[w]e'll take care of it." (Tr. 633).

CXVI.Thus, Mr. Ehele did not learn, until February 3,1993, of the ironworkers' concern that
laborers who were performing fire watch during the cool-down period were not signing on to
hot work permits. (Tr. 632). Prior to February 3, 1993, Ehele did not understand their fire
watch concerns were about laborers not signing on to the hot work permits. (Tr. 632).

CXVII.At the supervisors' meeting in the afternoon of February 3, 1993, Mr. Sparks suggested

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a fire watch program used at Browns Ferry Unit 2. He told Ehele that, with this program, "he
could effectively cover the fire watch in the drywell strictly with laborers and probably using
less people than we were using at that time." (Tr. 642). Sparks explained to Ehele that the
program would provide adequate coverage and would not affect safety or the number of
personnel in the drywell. (Tr. 642).

CXVIII.The ironworkers' fire watch concern was ultimately resolved by turning over both the
primary and secondary fire watch to the laborers, and allowing them to do it. (Tr. 642). On
February 8, 1993, the first Monday following the supervisors' meeting, the laborers again
assumed full responsibility for fire watches in the Unit 3 drywell. (Tr. 442).

CXIX.Butts explained that reassigning fire watch responsibility to the laborers improved safety
in the drywell because of confusion and controversy over ironworkers and laborers signing on
to different hot work permits. (Tr. 443). At that time, Butts saw that the best solution would
be to provide fire watch around the clock with a permanent assignment for each elevation of
the drywell. (Tr. 443). This would avoid the problem of fire watch personnel having to
maneuver back and forth. (Tr. 443).

CXX.Complainant and Larry Morrow acknowledged that the fire watch issue was eventually
resolved by giving fire watch responsibilities completely back to the laborers. (Tr. 184, 315-16).

Timothy Bradford

CXXI.Timothy Bradford was employed at Browns Ferry from April 1992 to February 1993, and for another three weeks sometime after that. Bradford was hired as an ironworker and was later designated foreman and then a lead foreman in June 1992. (Tr. 220). Bradford testified that he was in "a big building where [Stone & Webster] had all their office personnel," and he overheard Mr. Ehele say, to an unidentified listener, "We've got to get rid of that damn Harrison. He's already been to the NRC." (Tr. 227). Bradford was uncertain that those were the exact words, but he said Ehele's statement was to that effect. (Tr. 234). Bradford could not see the individual to whom Ehele was speaking. (Tr. 228).

CXXII.Bradford told no one about this alleged conversation before he was laid off from the Browns Ferry Plant site. Bradford was laid off in late February or early March, 1993. (Tr. 231). He forgot Ehele's statement until he was processing his layoff and he ran into Complainant. (Tr. 233). He said that at the time he overheard the conversation he did not see any reason to mention it to Complainant or anyone else. (Tr. 235).

CXXIII.Bradford could not recall the date of the alleged remark by Mr. Ehele. He only knew that it happened, "as I was being laid off. " (Tr. 227). Bradford said that Ehele's conversation probably occurred a week before Bradford was laid off in late February or early March. (Tr. 232).

CXXIV.Bradford drafted a diagram, at the request of Respondent's counsel, representing the layout of the supervisors' building [the Contractor Facility Complex], and the layout of the

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cubicles at the time Bradford allegedly overheard Ehele's conversation. (RX-4a, Tr. 228). Bradford estimated that he was approximately 20 feet away from Ehele when he heard the conversation, and that the only thing between them was a partition about four feet high. Bradford said he was looking at Ehele's left profile. (Tr. 229).

CXXV.Bradford explained that Ehele was standing in an office where Mr. Desmond and Mr. Butts had desks. (Tr. 237). Across the hallway from that office, Bradford represented that the Quality Control Department had offices. (Tr. 238). According to Bradford, the Quality

Control is on the north side of where Mr. Ehele was standing. (Tr. 239). According to Bradford, Ehele was standing inside a cubicle that did not open out onto the hallway, where Bradford was listening. (Tr. 238).

CXXVI.Mr. Ehele explained that in January and February 1993, he had an office in the Contractor Facility Complex. (RX-6, Tr. 644). As well, Mr. Butts identified RX-6 as an accurate depiction of the Contractor Facility Complex jointly shared by Stone & Webster and TVA in February 1993. (Tr. 430).

CXXVII.Mr. Ehele testified, contrary to Timothy Bradford, that there was no Quality Control in the area of Desmond's and Butts' desks in the Contractor Facility Complex in February 1993. (Tr. 647). As well, Ehele could not recall any specific occasion in February 1993 when he had any business in the TVA Quality Control area. (Tr. 645).

CXXVIII.Bradford was demoted from his lead foreman position to an ironworker journeyman position in September 1992. (Tr. 224). Mr. Tennyson evaluated Bradford's performance over time and discussed Bradford's performance with other supervisors. (Tr. 478). The supervisor's biggest concern was that Bradford was "less than adequate" as a lead foreman because he was not forceful enough about getting work completed on schedule. (Tr. 479).

CXXIX.Bradford's employment at Browns Ferry for Stone & Webster was briefly interrupted when his security clearance was withdrawn because of his positive drug test, which he alleged was false, when he had previously worked at Browns Ferry for TVA. (Tr. 221-22).

CXXX.At the hearing, Ehele strongly denied ever having a conversation with any individual in which he said, "we have to get rid of Harrison, he's been to the NRC," or any words to that effect. (Tr. 645).

CXXXI.Ehele testified that he did not know that Complainant had spoken with anyone at the NRC and did not learn that Complainant had done so until preparation began for these proceedings. (Tr. 643).

CXXXII.At the time that Bradford was reduced from lead foreman to journeyman ironworker, in September 1992, he was very unhappy with the demotion. (Tr. 249). He stated that he was

also dissatisfied with being laid off in February or March 1993. (Tr. 249, 259).

CXXXIII.When Bradford was cut back, from lead foreman, Mr. Butts discussed the cutback with Bradford. Bradford complained that he was being pushed too hard and being asked to

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push the ironworkers too hard. Bradford told Butts that he did not want to push his crews because "he didn't want them mad at him." (Tr. 435-36). Mr. Butts described Bradford's reaction to the cutback as "genuinely hurt" and "tremendously hurt . . . he took offense to it [the cut back from the lead foreman position] personally." (Tr. 435-36).

CXXXIV.Bradford complained to Mr. Butts about his lay-off in February or March 1993. (Tr. 259). He registered complaints with the Merit Systems Protection Board, his local union business agent and the representative of the international union, and also wrote to his U.S. Senator about the lay-off. (Tr. 259).

Discussion

This case arises under Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851. Douglas Harrison, the Complainant, formerly an ironworker, foreman, and lead foreman at the Browns Ferry Project outside Huntsville, Alabama, alleges that Respondent Stone & Webster, the contractor for the Tennessee Valley Authority ("TVA") licensed by the Nuclear Regulatory Commission ("NRC") to construct and operate the Browns Ferry Project, discriminated against him in contravention of the employee protection provisions of the Energy Reorganization Act. Specifically, Complainant alleges that he engaged in protected activity when he reported what he perceived to be violations of the Fire Protection Plan to TVA officials and to the NRC. Complainant alleges that because of his protected activity Stone & Webster demoted him from the position of lead foreman to a less responsible position and transferred him to a less responsible work area.

To establish a *prima facie* case under the applicable employee protection provisions, a complainant must show:

(a) that he engaged in protected activity;

(b) that the employer knew that the employee engaged in the protected activity;

(c) that the employer took some adverse action against the employee; and

(d) the employee must present evidence sufficient to at least raise an inference that the protected activity was the likely reason for the adverse action.

Sellers v. Tennessee Valley Authority, 90-ERA-14 (Secretary of Labor's Final Decision and Order, April 18, 1991), Decisions of the OALJ and OAA, Vol. 5, No. 2, March-April, 1991, p. 165, at 166, citing *Dartey v. Zack Co. of Chicago*, Case No. 82-ERA-2 (Secretary of Labor's Decision and Final Order, April 25, 1983) slip op. at 5-9.
Examples of employee conduct that the Secretary of Labor has held to be protected include: safety related complaints made by employees who perform supervisory or managerial functions,[2] internal complaints to management,[3] and reporting alleged violations to governmental authorities such as the Nuclear Regulatory Commission and the Environmental Protection Agency. *Carter v. Fluor Constructors Int'l, Inc.*, Case No. 93-ERA-19 (Administrative Law Judge's Recommended Decision and Order, August 2, 1993), Decisions of the OALJ and OAA, Vol. 7, No. 4, July-

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August , 1993, p. 71 at 84, relying on S. Kohn, *The Whistleblower Litigation Handbook* 37, 43 (1990).

If the employee establishes a *prima facie* case, the employer has the burden of producing evidence to rebut the presumption of disparate treatment by showing that the alleged disparate treatment was motivated by legitimate nondiscriminatory reasons. *Dartey v. Zack Co. of Chicago*, *id*. at 5-9. If the employer successfully rebuts the *prima facie* case, the employee still has an opportunity to demonstrate that the reasons proffered by the employer were a pretext. *NLRB v. Wright Line, A Div. of Wright Line*, 251 N.L.R.B. 1083 (1980, *aff'd*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). *See also Murray v. Henry J. Kaiser Co.*, No. 84-ERA-4, recommended D&O of ALJ, at 7 (June 22, 1984) ("A 'pretext' in the field of

labor relations is a word of art that generally means that 'the purported rule or circumstances advanced by the respondent did not exist, or was not, in fact, relied upon.'").

Finally, if the trier of fact decides that the employer's disciplinary actions were motivated by both illegal and legitimate reasons, then the dual motive test comes into play. Under the dual motive test, the employer bears the burden of proving that it would have discharged or disciplined the employee even in the absence of the employee's protected conduct. *Mackowiak v. University Nuclear Sys., Inc.*, 735 F.2d 1159, 1163-64 (9th Cir. 1984).

Complainant maintains that only Supervisors Butts and Ehele had an improper, retaliatory motive when they initiated deliberations regarding his demotion. As for Complainant's other supervisors, Complainant admits that the determination to reduce him from his lead foreman position was genuine. (Complainant's Brief, p. 8). Respondent argues that Complainant is unable to prove even a *prima facie* case, because his communications regarding the fire watch program did not relate to nuclear safety, and therefore are not protected by Section 210 of the ERA. As well, Respondent contends that Complainant cannot show that Stone & Webster knew he had engaged in any protected conduct or that any adverse action was taken against him as a result.

I. COMPLAINANT'S *PRIMA FACIE* CASE

A. Complainant's Protected Conduct

Stone & Webster Engineering Corp. is a contractor for the Tennessee Valley Authority, licensed by the Nuclear Regulatory Commission to construct and operate the Browns Ferry Project. The Browns Ferry Project, located outside Huntsville, Alabama, is a three-unit nuclear plant that produces electric power. Stone & Webster performs construction and maintenance work for the Project. At the time Complainant was employed in Unit 3 of the Project, Stone & Webster was performing a seismic upgrade of platform steel on several elevations inside the drywell of the Unit 3 reactor. (Findings 1, 3).

As one of two lead foremen in the Unit 3 drywell in January and early February 1993, Complainant conducted weekly safety meetings attended by ironworker crews under his

supervision and by Stone & Webster supervisors. At a safety meeting conducted by Complainant on February 1, 1993, several ironworkers expressed concerns, raised in several previous meetings, about the fire watch procedures. (Finding 19). The ironworkers were

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concerned that the fire watch was not being handled according to the procedure, set forth in Attachment I of the Fire Protection Program Plan, during the mandatory 30-minute cool-down period. (Finding 33). According to Attachment I, the ironworkers signed on to the hot work permit were responsible for fires in their work areas, even when the ironworkers were outside the drywell. (Finding 29). The ironworkers did not want to sign off on Attachment I certifying that they were responsible for fire watch in their work area during the cool-down because they feared that the roving fire watch performed by two laborers was not sufficient protection against the possibility of fires in their work areas. (Finding 34).

Complainant claims that he engaged in protected activity when he reported the ironworkers' complaints about the fire watch procedures to TVA officials, to Steve Ehele, and to the Nuclear Regulatory Commission. Until the February 1, 1993 safety meeting, Complainant had never expressed any fire watch objections to supervisors or anyone else. Complainant only got actively involved in trying to resolve the fire watch matter after listening to ironworkers complain at safety meetings for six weeks. (Finding 41). When Complainant's two foremen came to him after that safety meeting and said they needed some relief from the fire watch issue, Complainant went on a fact finding mission to see where the problem lay. (Finding 40).

First, Complainant went to the fire watch training facility maintained by TVA, then to fire protection, where Complainant expressed concerns about fire watch procedures to Gary Wallace, a TVA fire protection official. (Finding 42). Claimant then went with David Sparks, the lead foreman for the laborers, to explain to Steve Ehele, that they were trying to work out the problem so that the men could comply with the procedures. (Finding 43). Complainant told Mr. Ehele that he had been to fire protection and training to discuss the problem and that Mr. Wallace in fire protection wanted Steve Ehele to call him. (Finding 45). Although Ehele

did not say that he would do so, Complainant thought that after this meeting Ehele would assign more laborers to the roving fire watch. (Finding 45).

The next day, February 2, 1993, Complainant checked the Attachment I sign off sheet posted outside the drywell to find out whether supervision had assigned more roving fire watch to relieve the ironworkers during the cool-down period. Complainant saw that there had been no change in the number of roving fire watches. (Finding 46). Complainant went back to Mr. Wallace in fire protection and discovered that Steve Ehele had not contacted Mr. Wallace about Complainant's concerns raised the previous day. (Finding 47). Therefore, Complainant went to the Nuclear Regulatory Commission site office across the street. He claims he wanted to put his men in compliance with TVA regulations by any means possible. (Finding 48). Complainant told Joe Mundy, the NRC site representative, that the fire watch was being improperly administered during the mandatory cool-down because there not enough people to watch all the hot places that were in operation. (Finding 49). To confirm his description of noncompliance, Complainant showed Mr. Mundy the Attachment I sign-off sheet which allegedly revealed the elevations that were being worked and the number of fire watches for each elevation. (Finding 49).

Complainant believed that safety provisions of Attachment I were being violated when he reported the fire watch concerns to TVA, Stone & Webster, and to the NRC. (Finding 39). The ironworkers were afraid that the roving fire watch was not sufficient to watch all the areas

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on the elevation where hot work was performed. The ironworkers did not want to sign off on Attachment I certifying that they were liable for fires that might break out in the work areas during the cool-down period when the ironworkers were not in the drywell. During these cool-downs, the sole fire watch was performed by two laborers per elevation. The ironworkers worried that the roving fire watch could not possibly see all of the hot work areas. (Finding 34).

Complainant attempted to articulate these concerns about the fire watch to TVA officials and to Mr. Ehele on February 1, 1993, and to the NRC, and TVA again, on February

2, 1993. I find that Complainant had a good faith belief that the concerns he expressed substantially affected safety conditions in the drywell. Based on Complainant's good faith belief that the fire watch was being performed in violation of nuclear safety standards, Complainant's reports to TVA officials, Steve Ehele, and to the NRC constituted protected activity.

B. Respondent's Knowledge

Without prior knowledge that an employee engaged in protected activity, there can be no discriminatory motivation. *Crider v. Pullman Power Prods. Corp*, 82-ERA-7, slip. op. of ALJ at 2 (Oct. 5, 1982). An employee must prove such employer knowledge through either direct or circumstantial evidence. *NLRB v. Instrument Corp. of America*, 714 F.2d 324, 328-29 (4th Cir. 1983); *Larry v. Detroit Edison Co.*, No. 86-ERA-32, slip op. of ALJ at 6 (Oct. 17, 1986). Stone & Webster clearly had knowledge of Complainants internal contacts with TVA officials and with Steve Ehele, Stone & Webster's Chief Construction Supervisor on February 1 and 2, 1993. When Complainant, accompanied by David Sparks, the foreman for the laborers, met with Mr. Ehele on February 1, 1993, Complainant explained to Mr. Ehele that he had been to TVA fire protection and fire training, trying to work out the fire watch problem so that his men could comply with the procedures. (Finding 38). At the end of the meeting, Complainant told Mr. Ehele that Mr. Wallace, the TVA fire protection official wanted Ehele to contact him regarding Complainant's concerns. (Finding 40). Thus, Complainant made Mr. Ehele aware that he was in contact with TVA officials and that he had raised concerns to be addressed by Stone & Webster supervision.

The Employer argues that it did not have knowledge that Complainant engaged in protected activity because Complainant's comments to Mr. Ehele did not pertain to "significant" safety concerns. Arguably, the Employer reasonably believed that safety in the drywell was not compromised during the 30-minute cool-down, when only the laborers were performing a roving fire watch. (Findings 30, 108). As well, the Employer thought that the ironworkers' dissatisfaction with the fire protection plan stemmed from the additional responsibility imposed on them to perform their own fire watches. (Findings104-06, 110, 113).

Nevertheless, the burden is not on the Complainant to prove that his allegations are true. Complainant has shown that he expressed concerns, regardless of their veracity, that affected safety in the drywell. Complainant attempted to explain that the ironworkers did not want to be liable for fires in the drywell during the cool-down period when they were signed on to the hot work permit but were not in the drywell. The ironworkers felt that the roving fire watch could not physically watch all of the active hot work areas. *Supra* at 26. The

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Respondent's knowledge that Complainant was making complaints to TVA officials and to Stone & Webster supervision regarding these concerns of the ironworkers is sufficient to satisfy the Complainant's *prima facie* case.

On the other hand, I find that the Employer did not have knowledge of Complainant's reports to the NRC. Complainant admitted that he did not tell Mr. Wallace, the TVA fire protection officer, that he was going to the NRC when he left Wallace's office on February 2, 1993. (Finding 43). Complainant also testified that he knew it was the policy of NRC representatives to keep confidential any safety concerns brought to them by employees. Complainant did not believe that the NRC inspectors ever revealed his identity to Stone & Webster. (Finding 45). Mr. Butts and Mr. Ehele both confirmed that they did not learn of Complainant's report to the NRC until a few weeks before the hearing in this case. (Findings 103, 122). This evidence supports a finding that the Employer had no knowledge of Complainant's reports to the NRC.

C. Respondent's Adverse Actions Against Complainant

One of the requirements for a complainant to establish a *prima facie* case of discrimination under the statute, is that the respondent discharged or otherwise discriminated against the complainant with respect to his compensation, terms, conditions, or privileges of employment. *See Mackowiak v. University Nuclear Sys., Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984). Under the statute, various employer practices have been held to be illegal discrimination, including termination, elimination of a position, transfers and demotions, etc. *See DeFord v. Secretary of*

Labor, 700 F.2d 281, 283 (6th Cir. 1983); *Ellis Fischel State Cancer Hosp. v.*
Marshall, 629 F.2d 563, 566 (9th Cir. 1980); *Wells v. Kansas Gas & Elec.*
Co., No. 83-ERA-12, slip op. of ALJ at 18, adopted by SOL (June 14, 1984).
Complainant contends that the Respondent took adverse action against him by first, reducing
him from his lead foreman position on February 2, 1993, and second, transferring him to an
outside crew on February 4, 1993.

1. Complainant's Reduction From a Lead Foreman Position

First, Complainant cannot show that Stone & Webster discriminated against him by
reducing him from his lead foreman position. Respondent offered him a foreman position,
which Complainant refused to take, opting, instead, to take a job in a crew, as a journeyman
ironworker.

Complainant's supervisor, Wayne Tennyson, informed Complainant on February 2,
1993, that Complainant would be reduced from his lead foreman position in the drywell to a
foreman position in the same area. (Finding 52). At the time Complainant was informed of
his cut back, there were 38 ironworkers and nine designated foremen employed in the Unit 3
drywell, a ratio of three ironworkers per foreman. (Finding 81). Generally, Stone & Webster
maintains a ratio of about eight ironworkers per foreman. (Finding 81). As well,
Complainant was set up as second lead foreman in January 1993 under the condition that, in
case of a cut back, Complainant would be the first one reduced because of the seniority of the
other lead foreman. (Finding 15). Complainant was promoted to lead foreman to assist in
finishing up the "lower steel" on elevation 563. (Finding 14). At the time Complainant was
cut back, on February 2, 1993, the work on that level was nearing completion and Stone &

Webster was concentrating more on the higher levels. (Finding 79).

The evidence does not support a finding that Respondent took discriminatory action
against Complainant when it reduced Complainant from his lead foreman position.
Complainant was set up as lead foreman to accomplish a specific function: to finish the
"lower steel" on level 563. (Finding 14). When that task was nearly completed, Respondent

reviewed its rosters and decided that fewer foremen were needed. Rather than firing Complainant or reducing him to a non-supervisory position, Respondent reduced Complainant from his lead foreman position, so that only one lead foreman would be responsible for all the work in the Unit 3 drywell. As a foreman, Complainant would have lost approximately two dollars per hour in pay, but he would have retained the same benefits, and he would have retained his supervisory authority over a crew. (Finding 9). Complainant would have supervised one crew, and been responsible to Gene Hannah, the remaining lead foreman in the drywell, as his supervisor.

Complainant, however, rejected the foreman position offered to him, and insisted on taking a journeyman ironworker job. (Finding 60). Complainant said that he did not want to take a foreman's job and bump one of the foremen that had been working under him for some action Complainant had taken. He told his supervisor that he would rather go back in the crew. (Finding 55). In spite of his supervisor's repeated requests that he take a foreman job, Complainant insisted on moving down to a journeyman ironworker position. I find that neither Complainant's reduction from the lead foreman job, nor his voluntary choice to accept a lesser job than the one offered to him can be construed as discriminatory conduct by the Respondent.

2. Complainant's Transfer to an Outside Crew

Complainant's transfer to an outside ironworker crew on February 4, 1993, may have been an adverse action. On February 3, 1993, after Complainant was informed of his reduction and opted to take a position as a journeyman ironworker, Complainant requested that Gene Hannah, the lead foreman in the drywell, allow him to hold a meeting with his former crews. (Finding 57). Complainant explained to the men that he had been cut back the previous afternoon, that the fire watch problem was the same as it had been the day before, and that he had refused to take a foreman position because he did not want to punish one of his foremen for something he was doing. (Finding 57). As he left the meeting, Complainant admitted that he overheard the men say that they should refuse to reenter the drywell until the fire watch problem was straightened out. (Finding 58). Consequently, the ironworkers refused to enter the drywell to perform their work. Mr. Ehele had to come down to the area to speak

with the ironworkers personally to get them back to work. (Finding 58).

The following day, February 4, 1993, when Complainant came to work, he was in the east access building where the reactor is located, rather than inside the drywell. That morning Larry Morrow came to escort Complainant out of the area at Mr. Ehele's instruction. Larry Morrow told Complainant that he had heard Complainant was a trouble-maker, and that he was like Moses in the Red Sea to the ironworkers in the drywell. (Finding 63).

Mr. Ehele explained that when he saw that Complainant was still in the area of the Unit 3 drywell, he asked Mr. Morrow to get Complainant and return Complainant to his

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normal work area, outside the drywell. (Finding 65). Mr. Ehele thought that, by holding meetings with drywell workers that Complainant could undermine the authority of Gene Hannah, the lead foreman. He felt that Complainant had a following, and, by meeting with the ironworkers and preventing them from going about their business, Complainant was "acting as Moses when he parts the Red Sea." (Finding 65).

Through this evidence, Complainant has shown that Stone & Webster took adverse action against him, by transferring him to a work area outside of the drywell.

D. Inference that Complainant's Protected Activity Was the Likely Reason for the Respondent's Adverse Action

First, it must be noted that no inference of discriminatory motive can be drawn from the fact that Complainant's demotion closely followed his internal report of fire watch concerns. The Respondent's action in reducing Complainant from a lead foreman to a foreman was non-punitive, and was therefore not an adverse action. Although Complainant has shown that his reporting was protected under the Act, and that the Respondent had knowledge of his internal reports, Complainant failed to show that the Respondent took any adverse action against him by demoting him. Thus, no inference of discriminatory intent can be drawn from that non-punitive action.

To prove the Respondent's discriminatory motive in transferring him to an outside crew,

Complainant relies on, one, the testimony of Timothy Bradford, a former lead foreman in the Unit 2 reactor of the Browns Ferry Project, who claims he overheard Mr. Ehele say, "We've got to get rid of that damn Harrison. He's already been to the NRC;" and two, Steve Ehele's comments to Larry Morrow, that he thought Complainant was like Moses in the Red Sea to the ironworkers, when he ordered Complainant out of the drywell area.

1. Bradford's Testimony

Timothy Bradford was hired as an ironworker at the Browns Ferry Project in April 1992, and worked as an ironworker, foreman and lead foreman, at different times until February 1993, and for another three weeks as a journeyman ironworker sometime after that. (Finding 121). Bradford claims that he overheard a conversation between Steve Ehele and someone whom Bradford could not identify, in which Ehele stated, "We've got to get rid of that damn Harrison. He's already been to the NRC." (Finding 121). Bradford said Ehele's conversation allegedly occurred in a "big building where [Stone & Webster] had all their office personnel." (Finding 121). Ehele was in an area where there were many desks and cubicles. In the 20 feet between Bradford and Ehele, Bradford said there was a partition about four feet high. (Finding 124).

Bradford qualified his testimony by stating that he was uncertain those were the exact words Ehele used, but Ehele's statement was something to that effect. (Finding 121). Bradford did not tell anyone about this conversation at the time because he did not see any reason to do so. (Finding 122). He forgot the statement until the day he was processing his layoff, sometime in the end of February or the beginning of March, when he ran into Complainant. (Finding 122). Bradford also could not recall exactly when Ehele allegedly made this remark. Bradford said it must have been about a week before his layoff, sometime in February 1993.

(Finding 123).

Bradford had been demoted for cause from a lead foreman position to a journeyman ironworker position in September 1992. His supervisors' concern was that he was less than adequate as a lead foreman, and that he was not forceful enough about getting work

completed on schedule. (Finding 128). Mr. Butts testified that Bradford was personally offended by the cut back, and was also dissatisfied with being laid off sometime in the end of February or the beginning of March. (Findings 132, 133).

I find that Bradford's testimony is not reliable. He could not recall the exact statement made by Ehele, though he testified that he remembered the nature of it. At the time, he did not tell anyone that he overheard Ehele say, "We've got to get rid of that damn Harrison. He's already been to the NRC," or anything to that effect. He could not identify the person to whom Ehele was speaking or the name of the building where the conversation took place. Most important, Bradford could not recall when the alleged remark was made. He said it must have occurred about one week before he was laid off, but he did not know when he was laid off, except to say that it must have been late February or early March. (Finding 123). Complainant was unable to provide evidence that the alleged statement was made before Complainant's demotion or transfer to an outside crew. For these reasons, Timothy Bradford's testimony is not credible and will not support an inference that Respondent had a discriminatory motive in transferring Complainant to an outside crew.

2. Ehele's Comment to Larry Morrow

Steve Ehele made the statement to Larry Morrow that Complainant was "acting as Moses when he parts the Red Sea," the day after Complainant held an unscheduled meeting with the ironworker crew he had previously supervised. (Finding 65). Complainant met with his former crews on February 3, 1993, to inform them that the fire watch problem was unsolved and that Complainant was refusing to take a foreman's position because he did not want to punish one of his foremen for something he was doing. (Finding 57). Because of that meeting, the ironworkers refused to enter the drywell to perform their work. (Finding 58). Steve Ehele was forced to mediate with the ironworkers and get them back to work. (Finding 58).

On February 4, 1993, Mr. Ehele sent Larry Morrow to fetch Complainant out of the drywell and take him to a crew outside the drywell, where Complainant had been assigned. (Finding 63). Though Complainant testified that he was working in Terry Keeton's crew the

day after he was reduced from lead foreman, Complainant admitted that he did not remember where his supervisors assigned him. (Finding 60). Ehele said that Complainant had requested, through Larry Morrow, a transfer to an outside crew. Such a transfer request is not uncommon among lead foremen reduced to work in their own crews. (Finding 64).

I find that Ehele made the statement that Complainant was "acting as Moses in the Red Sea," in direct reference to Complainant's action in meeting with the ironworkers on February 3, 1993. The statement was unrelated to Complainant's protected reporting of fire watch safety concerns to TVA officials or Stone & Webster supervision. Complainant was not transferred to the outside crew after Stone & Webster was made aware of his internal

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reporting. His transfer came, either at his own request, according to Mr. Ehele, or after his unauthorized meeting with the ironworkers, which resulted in a work stoppage. In either case, such activity is not protected under the Act. Therefore, the statement cannot raise an inference that Complainant was transferred to an outside crew because of his protected activity.

The weight of the evidence proves that the roster review, which revealed an unacceptable ratio of ironworkers per foreman in the drywell, was a legitimate, non-discriminatory reason to reduce Complainant from his lead foreman position. Complainant was aware, at the time he was set up as lead foreman, that he would be the first reduced in case of a cutback, thus, Complainant's demotion was not punitive. Had Complainant accepted the foreman position offered to him, he would have retained supervisory authority over a crew. The Respondent is not responsible for Complainant's choice to forego the foreman position and take a position as a journeyman ironworker.

As well, Complainant's transfer to an outside ironworker crew, if not made at Complainant's request, was motivated by Complainant's unprotected activity in assembling the ironworkers which resulted in a work stoppage. Complainant's internal reporting of fire watch safety concerns was unrelated to the Employer's determination that Complainant should be transferred to an outside crew.

Considering the evidence as a whole, I find that Complainant has failed to prove that his protected activity was the likely reason for his reduction or transfer to an outside crew. Complainant has failed to set forth a *prima facie* case of retaliatory discharge.

RECOMMENDED ORDER

On the basis of the foregoing, I recommend that the complaint filed by Douglas Harrison be DISMISSED.

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RICHARD K. MALAMPHY
Administrative Law Judge

Newport News, Virginia
RKM/lsb

[ENDNOTES]

[1] The following citations to the record are used herein:

CX - Complainant's Exhibit
RX - Respondent's Exhibit
JX - Joint Exhibit
Tr. - Transcript.

Findings refer to the numbered findings in this decision.

[2] *Richter, et. al. v. Baldwin Assoc.*, NO. 84-ERA-9/10/11/12, D&O of remand by SOL, at 11-12 (March 12, 1986).

[3] There is a dispute regarding whether purely internal complaints to management constitute protected activity, however, the Secretary of Labor has issued decisions which find that an employee is protected when engaging in this particular activity. *See Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986) (upholding the Secretary of Labor's position that the employee protection provision of the Energy Reorganization Act protects purely internal complaints); *but see Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984) (holding that a quality control inspectors' internal filing of intracorporate complaint was not protected activity).